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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/357,957	07/21/1999	RICHARD LEVY	01064.0011-0	9917

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THE LAW OFFICES OF ROBERT J. EICHELBURG
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EXAMINER

MEDLEY, MARGARET B

ART UNIT

PAPER NUMBER

1714

DATE MAILED: 07/25/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/357,957

Applicant(s)

LEVY, RICHARD

Examiner

Margaret B. Medley

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 27 August 2002 and 01 May 0503.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 29-44 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 29-44 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892) 4) ☐ Interview Summary (PTO-413) Paper No(s). _____
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____ 6) ☐ Other: _____

DETAILED ACTION

The finality of the Office action in Paper No. 12 dated December 19, 2001 is withdrawn to make clarification to the record for the 102(b) rejection to follow the procedures as outlined in MPEP 2131.01 in the Office action. The Board of Appeal and Interference remand the instant application for the examiner failing to follow the procedures as outlined in MPEP 2131.01 when making the 102(b) rejection using multiple references.

In Paper No. 22 dated August 27, 2002 applicants has added new claim 44 that has been entered of record. The pending claims of record are claims 29-44.

Applicants' argument with respect to the 102(b) rejection is deemed moot in view of the new rejections set forth below.

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claims 29-44 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter, which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. The subject matter of claims 29 (and its dependent claims) at the last line, claim 32 at the last line, claim 34 at the last line, , claim 38 at the last line, , claim 40 at the last line, that the material for decreasing friction is a petroleum oil, ... "and mixtures thereof" are not properly

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described in the specification and claims as originally filed. The first full paragraph of page 18 and of page 23 of the instant application provides for each components being used individually. The originally filed claims provides for the use of the article “or” and not for the use of the article “and”. Therefore, the claims appear to be in conflict with the originally filed specification and claims.

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter, which the applicant regards as his invention.

Claims 29-44 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

In the last line of claims 1 and 57 (and its dependent claims) and in line 8 of claim 59 the phrase “and mixtures thereof” is confusing in that it is an improper term for the Markush grouping. The rejection may be overcome with the use of the term “or” in place of the term “and”. Clarification to the record is required.

The phrase “and a petroleum oil an isostearyl alcohol containing two oxyethylene groups” in lines 8-9 of claim 29 is confusing and unclear in that it is in conflict with the phrase “a petroleum oil, isostearyl alcohol containing two oxyethylene groups” in lines 11-12 of the same claim. Clarification is requested.

The material for decreasing friction in lines 4-12 of claims 29 is confusing and unclear because lines 8-9 uses the articles “or” and “and” several times so that it is unclear as to the scope of protection that applicant is seeking under the Markush grouping. The phrase “and

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mixtures thereof” in line 12 is in conflict with lines 8-9 of the same claim. Clarification is requested.

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claim 29 is rejected under 35 U.S.C. 102(b) as being anticipated by Hopkins, Jr. et al 5,362,788 combined with The Merck Index and Admitted Prior art.

Hopkins teaches a process for preparing a composition comprising a matrix of cellulose acetate, glycerin and a superabsorbent polymer, SAP, e.g., SANWET[®] which is starched grafted polyacrylate sodium salt that has the capacity to absorb as much as 800 times its own weight in liquid, note Example 1, claims 1-3, abstract, and column 1, line 29 to column 2, lines 1-33.

Hopkins is silent to the glycerin having lubricant characteristic and the chemical and physical properties for the SAP.

The Merck Index is relied on as a teaching reference that glycerin has lubricant properties and characteristics and is present in its composition. The said reference provides the state of the art knowledge at the time of the claimed invention that the glycerin of Hopkins inherently has lubricant properties.

Applicant make admission on record that their superabsorbent polymers are those of Brannon-Peppas notes the paragraph bridging pages 24-25 of the instant application. Brannon-Peppas teaches various known superabsorbent polymers and their chemical and physical properties including the ability to absorb greater than 100 times its weight in water. Patentee

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also teaches conventional well-known superabsorbent polymers that are commercially available, note particularly pages 245. Therefore the admitted prior art of Brannon-Peppas teaches that the chemical and physical properties of the SAP of Hopkins are inherently present therein and in its composition.

Instant claim 29 composition is anticipated by the composition of Hopkins combined with the teachings of the Merck Index and the admitted Prior Art of Brannon-Peppas that the glycerin inherently have lubricant properties or characteristic and that SAP inherently have the same chemical and physical properties or characteristics as the SAP of the instant claim.

With respect to the limitation that the composition is “substantially anhydrous” the examiner takes the position that the composition of Hopkins comprises same component as that of the instant claims and therefore the composition of Hopkins inherently is “substantially anhydrous”.

When applicant’s product and that of the prior art appears to be identical or substantially identical, the burden shifts to applicants to provide evidence that the prior art product does not necessarily or inherently possess the relied-upon characteristics of applicants claimed product. In re Fitzgerald, 619 F.2d 67, 70, 205 USPQ 594, 596 (CCPA 1960); In re Best, 562 F.2d 1252, 1255, 195 USPQ 430, 433-34 (CCPA 1977); In re Fessmann, 489 F.2d 742, 745, 180 USPQ 324, 326 (CCPA 1974). The reason is that the Patent and Trademark Office is not able to manufacture and compare products. See Best, 562 F.2d at 1255, 195 USPQ at 434; In re Brown, 459 F.2d 531, 535, 173 USPQ 685, 688 (CCPA 1972). Therefore the instant claims are anticipated by the teachings of Hopkins.

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Claims 29, 33-36 and 41-43 are rejected under 35 U.S.C. 102(b) as being anticipated by Admitted Prior Art of Levy 4,985,251 combined with Brannon-Peppas.

Applicant makes admission on record that admitted prior art Levy 4,985,251, note 18 for Example 1, teaches a process for preparing a composition, and a composition comprising water, superabsorbent polymer (SAP) SuperSorb[®], a polymer that absorbs greater than 100 times its weight in water, and Arosurf[®] MSF, (fatty acid esters, ethers and alcohols), that functions as a film forming agents, as a surfactant emulsifier, or as an insecticidal, note column 17, lines 42-54. Applicant further make admission on record that their superabsorbent polymers are those of Brannon-Peppas, note the paragraph bridging pages 24-25 of the instant specification. The admitted prior art Levy is silent to the chemical and physical properties of its SAP.

Brannon-Peppas teaches various known superabsorbent polymers and their chemical and physical properties including the ability to absorb greater than 100 times its weight in water. Therefore, the teachings of Brannon-Peppas clearly provides teachings and support that the ability to absorb greater 100 times its weight in water and the chemical and physical properties of its SAP would inherently be present in the SAP and composition of Levy. Patentee also teaches conventional well-known superabsorbent polymers that are commercially available, note particularly page 245. The composition and process for producing said composition comprising a SAP, water and a film forming additive or surfactant of Levy '251 inherently would have the same physical and chemical properties as taught by Brannon-Peppas. The claimed composition and process of making when used as a lubricant composition inherently reduce friction because water, a universal well-known lubricant, reduces friction. Thus the instant claims are anticipated by the teachings of the Admitted Prior Art of Levy combined with the teachings of Brannon-

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Peppas that the characteristics of the lubricant and SAP are inherently present in the lubricant and SAP of the Admitted Prior Art of Levy '251.

With respect to the limitation that the composition is “substantially anhydrous” the examiner takes the position that the composition of Hopkins comprises same component as that of the instant claims and therefore the composition of Hopkins inherently is “substantially anhydrous”.

When applicant's product and that of the prior art appears to be identical or substantially identical, the burden shifts to applicants to provide evidence that the prior art product does not necessarily or inherently possess the relied-upon characteristics of applicants claimed product. In re Fitzgerald, 619 F.2d 67, 70, 205 USPQ 594, 596 (CCPA 1960); In re Best, 562 F.2d 1252, 1255, 195 USPQ 430, 433-34 (CCPA 1977); In re Fessmann, 489 F.2d 742, 745, 180 USPQ 324, 326 (CCPA 1974). The reason is that the Patent and Trademark Office is not able to manufacture and compare products. See Best, 562 F.2d at 1255, 195 USPQ at 434; In re Brown, 459 F.2d 531, 535, 173 USPQ 685, 688 (CCPA 1972). Therefore the instant claims are anticipated by the teachings of the Admitted Prior Art of Levy.

Claims 29, 30, 35-36 and 41-42 are rejected under 35 U.S.C. 102(b) as being anticipated by Geursen WO93/18223.

Geursen teaches composition for treating a substrate comprising a superabsorbent polymer (SAP) in an oil-and-water emulsion, wherein the liquid constituents of the emulsion, see the abstract. In addition the composition comprises a lubricant and additive of the sort contemplated by applicants in the instant claims, note pages 7-8. Geursen teaches the same type of SAP contemplated by applicants, according to the requirement that the SAP absorbs greater

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than 100 times its weight in water property is inherent, page 6. Furthermore, Geursen teaches that SAP known in the art capable of absorbing 10 to 100 times its own weight in water are of acrylic acid salt, acrylic acid and acrylonitrile, note page 3, and the property of absorbing 100 times its weight in water is inherent. Thus the teachings of Geursen anticipate the instant claims.

With respect to the limitation that the composition is “substantially anhydrous” the examiner takes the position that the composition of Hopkins comprises same component as that of the instant claims and therefore the composition of Hopkins inherently is “substantially anhydrous”.

When applicant's product and that of the prior art appears to be identical or substantially identical, the burden shifts to applicants to provide evidence that the prior art product does not necessarily or inherently possess the relied-upon characteristics of applicants claimed product. In re Fitzgerald, 619 F.2d 67, 70, 205 USPQ 594, 596 (CCPA 1960); In re Best, 562 F.2d 1252, 1255, 195 USPQ 430, 433-34 (CCPA 1977); In re Fessmann, 489 F.2d 742, 745, 180 USPQ 324, 326 (CCPA 1974). The reason is that the Patent and Trademark Office is not able to manufacture and compare products. See Best, 562 F.2d at 1255, 195 USPQ at 434; In re Brown, 459 F.2d 531, 535, 173 USPQ 685, 688 (CCPA 1972). Therefore the instant claims are anticipated by the teachings of Geursen.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

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Claims 29, 30, 35-36 and 41-42 are rejected under 35 U.S.C. 103(a) as being unpatentable over Sayad et al 3,336,225 combined with Admitted Prior Art in view of Hopkins, Jr. 5,362,766 et al and Guersen et al WO93/182,263 (and its US counter part US 5,534,304.

Sayad et al teach a method and lubricant composition for reducing friction comprising an aqueous solution of fatty acid soaps, and polymers selected from polyacrylamide polymers or copolymers, acrylic acid and salts thereof and additional additives including antifoaming agents, wetting agents, coupling agents (solubilizing agents), anti-microbial agents, corrosion inhibitors, pH buffers or controls, and the like, note in the entirety, especially column 1, lines 28 to column 2, lines 1-46, Examples I-III, Tables I-III, column 4, line 59-end and claims 1-13.

Applicant's instant claims differ from the claims of the prior art in that applicant explicitly requires that the SAP absorbs greater than about 100 times its weights.

It is the Examiner's position that it would be obvious to artisan in the art to use SAP that absorbs greater than 100 times its weight in waters in view of the admitted prior art and Hopkins, Jr., et al.

Applicants make admission on record in the instant application at page 4 first full paragraph and the paragraph bridging pages 24-25 that the Levy Patents 4,983,389 and 4,985,251; Takeda et al Patents 4,525,527; and 4,612,250 Mikita et al Patents 4,552,938; 4,618,631; 4,654,393 and 4,703,067; Alexander et al 4,677,174; Brannon-Peppas, Absorbent Polymer Technology, 1990; and Buchholz et al Superabsorbent Polymers, Science and Technology, 1994 ACS teach a number of SAP comprising acrylic ester, acrylonitrile, acrylamide, co-polymer thereof or mixtures thereof, that absorbs greater than about 100 times its weight in water.

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Patentee Levy '251 further teaches compositions and process for making said compositions comprising water, SuperSorb[®], that absorbs greater than 100 times its weight in water and Arosurf[®], MSF (fatty acid esters, ethers and alcohols), that functions as a film forming agent or surfactant or emulsifier or an insecticidal, note column 17 lines 42-54.

Hopkins teaches a composition and a process for making comprising a matrix of cellulose acetate, glycerin and a superabsorbent polymer, SAP, e.g., SANWET[®], which is a starch grafted polyacrylate sodium salt that has the capacity to absorb as much as 800 times its own weight in liquid, note Example 1, claims 1-3, abstract, and column 1, line 29 to column 2, lines 1-33.

Geursen et al teach and disclose water-in-oil emulsion, note page 5, lines 23-24 comprising superabsorbent polymers, the same type of SAP contemplated by applicants, accordingly the requirement that the SAP has the capability to absorb 100 times its weight in water property is inherent, note page 6, line 5-end and provide for the inclusion of lubricants and other conventional additives, note page 7, line 6 to page 8, lines 1-17 and page 16, line 25 to page 17, line 1-12.

Applicant make admission on record that their superabsorbent polymers are those of Brannon-Peppas, note the paragraph bridging pages 24-25 of the instant application. Brannon-Peppas teaches various known superabsorbent polymers and their chemical and physical properties including the ability to absorb greater than 100 times its weight in water. Patentee also teaches conventional well-known superabsorbent polymers that are commercially available, note particularly page 245. It would have been obvious to the artisan in the art to substitute the SAP of the secondary references for the polymers of the primary reference for the same intended function to absorb greater than 100 times its weight in water.

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Therefore the teachings of Sayad combined with the teachings of the secondary references provide the motivation to the artisan in the art to use the commercially available SAP of the secondary reference to provide the property to absorb greater than 100 times its weight in water in the composition of the primary reference.

With respect to the limitation that the composition is “substantially anhydrous” the examiner takes the position that the composition of Hopkins comprises same component as that of the instant claims and therefore the composition of Hopkins inherently is “substantially anhydrous”.

When applicant's product and that of the prior art appears to be identical or substantially identical, the burden shifts to applicants to provide evidence that the prior art product does not necessarily or inherently possess the relied-upon characteristics of applicants claimed product. In re Fitzgerald, 619 F.2d 67, 70, 205 USPQ 594, 596 (CCPA 1960); In re Best, 562 F.2d 1252, 1255, 195 USPQ 430, 433-34 (CCPA 1977); In re Fessmann, 489 F.2d 742, 745, 180 USPQ 324, 326 (CCPA 1974). The reason is that the Patent and Trademark Office is not able to manufacture and compare products. See Best, 562 F.2d at 1255, 195 USPQ at 434; In re Brown, 459 F.2d 531, 535, 173 USPQ 685, 688 (CCPA 1972). Therefore the instant claims are anticipated by the teachings of Sayad combined with the teachings of the secondary references.

Claims 31-34, 37-40 and 43-44 are rejected under 35 U.S.C. 103(a) as being unpatentable over Sayad et al (Sayad) 3,336,225 combined with Admitted Prior Art in view of Hopkins, Jr. et al (Hopkins, Jr.) 5,362,766 and Geursen et al (Geursen) WO/93,182,236 (and its US, counterpart 5,534,304) as applied to claims 29-30, 35-36 and 41-42 above, and further in view of Schey and Booser.

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Applicants further claim material for reducing friction selected from petroleum lubricant or grease thereof, and optionally a lubricative additive (claim 30); an inorganic solid lubricant of claim 31 (claim 32) note Schey for said teachings, pages 149, 164-169, 433, 493, 500, 501; solid organic lubricant and optionally a lubricant (claim 33), specific solid organic lubricant and optionally a lubricant additive (claim 34), note Schey for said teachings, pages 149 and 164-165; solid lubricant and water and a lubricant additive (claim 37); specific solid lubricant and water and a lubricant additive of claim 37 (claim 38), note Schey for said teachings, pages 149, 164-174, 433-435, 500-501; phosphate friction modifiers and optionally a lubricant (claim 39); specific phosphates of claims 39(claim 40) note pages 495 or Schey for said teachings.

The secondary references Schey teaches various well-known lubricants and friction additives conventionally used in metal working for friction, lubrication and wear properties including the synthetic and hydrocarbon oils, and greases thereof, waters, solid lubricants (organic and inorganic alone or mixtures thereof), phosphates, soap, water with solids or oils or greases thereof, fatty oils, acids or waxes thereof with other conventionally lubricant additives, note pages 179, 431-436, 465-470 and 487-503 that contemplate the friction components of the instant claims. Booser teaches conventional and well-known lubricants and friction additives for moving surfaces, note pages 47-56, 269, 301-314, 329-333, 525 and 529-530 wherein the teachings of Booser contemplates the friction components of the instant claims.

It would be obvious to the artisan working in the lubricant art to use the lubricants, friction additives and lubricant additives of the secondary references as the lubricants, friction additives and lubricant additives of the primary references because combining two or more material disclosed by the prior art for the same intended purpose to form a third material that is

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to be used for the same purpose has been held to be a prima facie case of obviousness, see *In re Kerkhoven*, 205 USPQ 1069.

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 29-43 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 57-71 of copending Application No. 09/359,809. Although the conflicting claims are not identical, they are not patentably distinct from each other because the instant claimed compositions comprising the same components as the product by process composition comprising the components of related application 09/359, 809 render obvious the instant claims of the related application.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

With respect to the 103 rejections, the rebuttals are addressed in Paper No. 12 dated December 17, 2001 and are not repeated herein.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Margaret B. Medley whose telephone number is (703) 308-2518. The examiner can normally be reached on Monday--Friday from 7:30 a.m. to 6:30 p.m..

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Vasu Jagannathan can be reached on (703) 306-2777. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 872-9310 for regular communications and (703) 872-9311 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0661.

M.B. Medley
June 11, 2003


MARGARET MEDLEY
PRIMARY EXAMINER